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1200 New Jersey Avenue S.E.  
Washington, D.C. 20590

June 26, 2008

Mr. David H. Pflieger  
Senior Vice President & General Counsel  
Virgin America Inc.  
555 Airport Boulevard  
Burlingame, CA 94010

Dear Mr. Pflieger:

This letter is in response to the motion of Virgin America, Inc. ("Virgin America") to withhold from public disclosure certain Form 41 financial, traffic, and Origin and Destination Survey (O&D) data submitted to the Bureau of Transportation Statistics (BTS) until such time as Virgin America becomes a Group III air carrier under the Department's regulations. Specifically, Virgin America seeks confidential treatment for the following Form 41 schedules:

B-1	Balance Sheet
B-12	Statement of Cash Flows
B-43	Inventory of Airframes and Aircraft Engines
P-1.2	Statement of Operations
P-2	Notes to BTS Form 41 Report
P-5.1	Aircraft Operating Expenses – Group I
P-6	Operating Expenses by Objective Groupings
P-1(a)	Interim Operations Report
T-100	Traffic Data By Nonstop Segment/On-Flight Market
O&D	Passenger Origin Destination Survey Report

#### **BACKGROUND**

In August 2007, Virgin America began conducting scheduled passenger operations, and, during the October 1-December 31, 2007, Form 41 reporting period, served a total of six point-to-point markets: SFO-LAX, SFO-JFK, SFO-IAD, SFO-LAS, LAX-JFK, and LAX-IAD. On March 14, 2008, Virgin America filed a motion to withhold from public disclosure certain information contained in its Form 41 financial, traffic, and O&D submissions to the Department (Docket OST 2008-0107). In its motion, Virgin America seeks confidential treatment for data covering the airlines' first full quarter of operations, the October 1, 2007, through December 31, 2007, reporting period. On April 8, 2008, Virgin America filed a cover letter referencing the March 14, 2008, motion requesting the Department withhold from public disclosure certain information contained in its monthly Schedule P-1(a) for the months of January and February 2008. On March 3, March 30, April 15, and June 17, 2008, Virgin America submitted a request for confidential treatment for its Form 41 Schedule T-100 report for the months of January, February, March, and April 2008, respectively. On May 19, 2008, Virgin America also

requested confidentiality for the Passenger Origin Destination Survey Report for the quarter ended March 31, 2008.

## PLEADINGS

Virgin America's motion asserted that public release of the detailed operational, traffic and financial information contained in its Form 41 submissions would cause Virgin America to suffer substantial competitive harm because of the local nature of its passenger traffic from its point-to-point markets and the limited number of aircraft types operated by Virgin America will permit competitors to: (1) obtain commercially sensitive competitive information on Virgin America's service in these markets; and (2) accurately calculate a variety of market-specific information, including cost per available seat-mile ("CASM"), yield, revenue per available seat-mile ("RASM") and profit margins. Virgin America noted that although the public release of this Form 41 data has the potential to harm Virgin America competitively, the exclusion of the detailed Virgin America-specific data for a limited time period will have no appreciable effect on the Department's overall data collection and industry analysis efforts. Virgin America further asserted that while competitors could use Virgin America data to precisely direct their competitive response to Virgin America's low-fare service, Virgin America cannot, conversely, use Form 41 data to its advantage because of the difficulties in disaggregating competitors' market and aircraft specific financial data from a far greater number of markets, services, and aircraft types. Virgin America also asserted that its request for confidential treatment of its Form 41 information is fully consistent with the Department's prior confidentiality determinations, including its decision to protect the confidentiality of essentially the same information provided by Virgin America in its initial certification and fitness review. Carriers routinely submit business forecasts as part of their initial certification and fitness review. Historically, the Department does grant confidential treatment to such forecasts. It should be noted, however, that once an air carrier receives a certificate and begins operations, such treatment is not routinely granted.

Virgin America claimed that the information should be withheld under Exemption 4 of the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b) (4), which permits protection of trade secrets and commercial or financial information obtained from a person and privileged or confidential, see *Gulf & Western Industries, Inc. v. United States*, 615 F.2d 527, 530 (D.C. Cir., 1980); see also *National Parks & Conservation Ass'n. v. Kleppe*, 547 F.2d 673, 684 (D.C. Cir., 1976); *Sterling Drug, Inc. v. Federal Trade Commission*, 450 F.2d 698, 709 (D.C. Cir., 1971); Joint Application of United and Lufthansa, Order 93-12-32 (December 18, 1993); Joint Application of Northwest and KLM, Order 93-1-11 (January 8, 1993). Virgin America noted "To fall within Exemption 4, the information at issue must be: (1) commercial or financial in nature; (2) obtained from a person outside the government; and (3) privileged or confidential. See *Public Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1290 (D.C. Cir. 1983); *Gulf & Western*, 615 F.2d at 529.

## ANSWERS

On March 24, 2008, American Airlines, Inc. (American) answered in opposition to Virgin America's March 14, 2008 motion. In their answer, American objected to Virgin America's

request and noted that it would be highly unfair, prejudicial to other reporting carriers, and adverse to the public interest to withhold Virgin America's Form 41 financial, traffic, and O&D data when the data submitted by all other carriers are released immediately. American noted that timely release of carrier data is of paramount importance to its usefulness; and it is well established that unilateral disclosure of data submitted by one group of carriers when another group of carriers is not disclosing similar data is contrary to the public interest. American also noted that there is nothing unique about Virgin America's request that would justify the unique treatment it is seeking. American noted that if Virgin America's request were granted, other carriers would also attempt to opt out of the public data system by applying for confidential treatment of their submissions, and the data that did remain publicly available would be of diminished utility to the numerous stakeholders. American also noted that the outcome in *ExpressJet* (Docket DOT-OST-2007-28390) fully supports the denial of Virgin America's motion. American also requested the Director of BTS deny Virgin America's request without the initial step of a staff decision under assigned authority. See American's Answer at Docket DOT-OST-2008-0107.

On March 25, 2008, United Air Lines, Inc. (United) also answered in opposition to Virgin America's March 14, 2008, motion. In their answer, United stated:

"In conclusion, United urges the Department to deny the Motion of Virgin to withhold most of its Part 241 reports from public disclosure. The Department's reasoning and findings relating to its recent denial of the similar relief sought by *ExpressJet*, as discussed above, apply with equal or even greater weight to the more expansive relief sought here by Virgin. In addition, United urges the Department to act quickly to deny Virgin's motion to avoid the result in the *ExpressJet* case where most of the anticompetitive benefits sought by the carrier were achieved as a result of the delay in the Department's decision-making process. These issues have now been fully ventilated and resolved in the *ExpressJet* case, and the Department's policy and reasoning fully set forth in its decision. That same policy should now be applied quickly to Virgin by expeditiously denying its Motion."

United had no objection to Virgin America's request as to its Schedule Form B-43 report relating to the confidentiality of aircraft and engine data in circumstances where the Department has consistently granted confidentiality.

In addition to American and United, several other air carriers (Alaska, Delta, Horizon, Jet Blue, Northwest, and Southwest) filed in opposition to Virgin America's request to withhold financial, traffic and O&D data from public disclosure.

On April 2, 2008, Virgin America filed its Motion and Consolidated Reply to the March 24, 2008, and March 25, 2008, Answers of American Airlines, Inc. (American), Alaska Airlines, Inc. (Alaska), Jet Blue Airways Corporation, (Jet Blue), Delta Air Lines, Inc. (Delta), Northwest Airlines, Inc. (Northwest), and United Air Lines, Inc. (United). In its motion Virgin America noted that no parties will be prejudiced by granting the motion, which will serve to clarify and correct the record in this proceeding, and provide the Department with a complete and accurate record upon which to base its decision.

On April 3, 2008, American Airlines, Inc., Alaska Airlines, Inc., Jet Blue Airways Corporation, Delta Air Lines, Inc., Northwest Airlines, Inc., and United Air Lines, Inc. answered in a joint letter that they did not intend to respond to the unauthorized consolidated reply filed on April 2, 2008, by Virgin America. The carriers stated in their joint letter that:

“Virgin America’s unauthorized pleading adds nothing new to the record, and, like its original motion, is merely calculated to gain tactical advantage over other Form 41 filers by creating procedural delay. The record was complete when the authorized answers to Virgin America’s motion were filed last week, and the reporting carriers identified below urge that the Department handle this matter on an expedited basis and promptly deny the motion of Virgin America.”

## FINDINGS

Except for four columns of cost data on Schedule B-43 (“Acquired Cost or Capitalized Value,” “Allowance for Depreciation or Amortization,” “Depreciated Cost or Amortized Value,” and “Estimated Residual Value”), we are denying the requests for confidential treatment of Virgin America’s Form 41 financial, traffic, and O&D data submissions to the Department for the months of October, November, and December, 2007, O&D data for the quarter ended March 31, 2008, and Form 41 Schedules P-1(a) for the months of January and February 2008.

Exemption 4 of FOIA applies to “trade secrets and commercial or financial information obtained from a person and privileged or confidential.” (5 U.S.C. 552(b)(4)). Subsequent Federal case law interpreting applicability of Exemption 4 has distinguished between documents supplied to a U.S. government agency **voluntarily**, and those for which submission is **mandated** by law or regulation. See, *National Parks and Conservation Assn. v. Morton*, 498 F.2d 765 (D.C. Cir., 1974) (criteria for determining propriety of releasing **involuntarily** submitted documentation) (*emphasis added*).

It is well established that Form 41 financial, traffic, and O&D data contains commercial or financial information, and the information was obtained from a person outside the government. The next determination is whether the information is confidential or privileged.

The filing of Form 41 financial, traffic, and O&D data is required by 14 C.F.R. §241.19-7 and §241.22. Thus, the appropriate test for determining whether Virgin America’s reports may be properly withheld as confidential is that which is set out in the *National Parks* case:

To summarize, commercial or financial matter is ‘confidential’ for purposes of this exemption if disclosure of the information is likely to have either of the following effects: (1) to impair the Government’s ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained. *Emphasis added.*

Id. At 770. Information having either of these effects is exempt from release.

Submission of the Form 41 financial, traffic, and O&D data to the Office of Airline Information is mandated by 14 C.F.R. §241.19-7 and §241.22 for all large certificated air carriers. Because these carriers do not have the option of refusing to submit this information in the future, release of the information will not impair the Government's ability to obtain similar data in the future.

The next test to be applied under the *National Parks* analysis is the determination of whether there exists evidence of the likelihood of "substantial competitive harm." This test was enunciated by the Circuit Court of the District of Columbia:

In order to show the likelihood of substantial competitive harm [by the release of information to the public], it is not necessary to show actual competitive harm. Actual competition and the likelihood of substantial competitive injury is all that need be shown.

*Gulf & Western Industries V. United States* 615 F.2d 527, 530 (D.C. Cir., 1979)  
*National Parks & Conservation Ass'n. v. Kleppe* 547 F.2d 673, (D.C. Cir., 1976).

Virgin America unquestionably has competition from a number of air carriers and undoubtedly these carriers will review Virgin America's data. However, we disagree that the release of Form 41 financial, traffic, and O&D data will permit a competitor to use this information to make strategic judgments that would likely cause substantial harm to Virgin America's competitive position. Carriers compete for customers based on a number of factors as customers shop for the best available transportation services. Some carriers compete on price but others emphasize the quality of the product it is offering consumers. These factors are not divulged in the Form 41 financial, traffic, and O&D data. All large certificated carriers including new "startup" carriers have their financial, traffic, and O&D data publicly released and the Department is unaware of any of these carriers suffering substantial competitive harm due to the public disclosure of the aviation data at issue. It would be counter to the Department's longstanding data dissemination practices and the public interest for us to grant a motion of confidential treatment for Virgin America's Form 41 financial, traffic, and O&D data absent strong evidence of the likelihood of substantial competitive harm (see, *Martin Marietta Corp. v. Dalton*, 974 F. Supp. 37 (D.D.C. 1997)). Moreover, it would be unfair for the Department to deny Virgin America's competitors access to Virgin America's reports while their reports are subject to review by Virgin America (see, *Silverberg v. HHS*, No. 89-2743, 1991 WL 633740 (D.D.C. June 14, 1991)).

The Department also considered the concerns expressed by the opposing carriers. The Department agrees it would be highly unfair, prejudicial to other reporting carriers, adverse to the public interest to withhold Form 41 financial, traffic, and O&D data when the data submitted by all other carriers are released immediately. Timely release of carrier data is of paramount importance to its usefulness since all carriers rely on the Department's data as the fundamental and least expensive source of industry data. Public disclosure of financial, traffic, and O&D data enumerated in Part 241 of the Department's regulations is one of the obligations that comes from being a certificated air carrier. We also agree with the opposing carriers that if the Department granted Virgin America's request, other carriers would also attempt to opt out of the public Form 41 financial, traffic, and O&D data system by requesting confidential treatment of their submissions, and these data would soon become fragmented and of little use to the Department's numerous stakeholders (air carriers, airports, government agencies, manufacturers,

industry associations, consultants, academia, researchers, financial analysts, investors, and the general public). The opposing carriers firmly believe that more rather than less transparency will enhance competition, and there is simply no reasonable policy basis or precedent for affording any carrier-even Virgin America-special protection from competition.

The Department has long held that competition is promoted, and consumers benefit, by maximizing the amount of information in the public domain. The Department has also concluded that in a deregulated airline market "more rather than less transparency will enhance new entry and reliance on competitive market forces." As emphasized in the ExpressJet case, the Department seeks to avoid shielding any carrier from competition, including new entrants, or favoring one competitor over another in a deregulated environment. Such action would not be consistent with the DOT's mandate to encourage, develop, and maintain an air transportation system that relies primarily on market forces.

Virgin America has failed to demonstrate how the release of the Form 41 financial, traffic, and O&D reports is likely to cause substantial competitive harm. Virgin America seeks reconsideration of an issue that the Department conclusively resolved in the ExpressJet case where the grounds offered by ExpressJet in Docket DOT-OST-2007-28396 were virtually identical to those currently offered by Virgin America. ExpressJet asked for confidential treatment of its T-100 traffic data pertaining to its recently initiated branded service. The branded service consisted of point-to-point operations in relatively small city-pair markets utilizing small regional jet aircraft. ExpressJet asserted that the combination of these factors made public release of the detailed operational and traffic data particularly harmful to the competitive position of ExpressJet's new branded service. Virgin America has offered no legitimate factual or legal basis for the exclusive broader relief it is seeking.

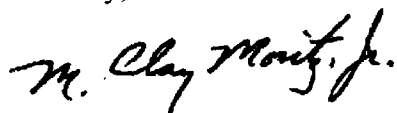
Accordingly, Virgin America's March 14, 2008, motion and April 8, 2008, and May 19, 2008, cover letters requesting confidentiality for its Form 41 financial, traffic, and O&D reports is denied except for Schedule B-43, "Inventory of Airframes and Aircraft Engines." Virgin America's March 14, 2008, motion requesting confidentiality for its aircraft cost data reported on Schedule B-43 for the year ended December 31, 2007, is granted. The Department will withhold from public disclosure the cost data reported in four columns of Virgin America's Form 41 Schedule B-43 for the year ended December 31, 2007, for 10 years from the date on which the B-43 is due to be filed. This is the same time period that other carriers have consistently been granted pursuant to Rule 12 of the Department's Rules of Practice (14 CFR 302.12). The four columns on B-43 are:

"Acquired Cost or Capitalized Value,"  
"Allowance for Depreciation or Amortization,"  
"Depreciated Cost or Amortized Value,"  
"Estimated Residual Value."

The above action is taken under authority granted by 14 C.F.R. §385.19(i). It will become an action of the Department, and Virgin America's Form 41 schedules B-1, B-12, P-1.2, P-1(a), P-2, P-5.1, P-6, and T-100 for October, November, and December 2007; the O&D Survey report for the quarter ended March 31, 2008, the Form 41 Schedule P-1(a)s for January and February

2008, and the Form 41 Schedule T-100s for the months of January, February, March, and April 2008, will be available for public inspection, unless an appeal is filed in accordance with the procedures of 14 C.F.R. § 385.30 et seq. within 10 days from the date of this letter.

Sincerely,

A handwritten signature in black ink, reading "M. Clay Moritz, Jr." in a cursive style.

M. Clay Moritz, Jr.  
Acting Assistant Director  
Airline Information